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NO. 80-1504

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

MARK SUMMITT,
PETITIONER,

VS.

STATE OF NORTH CAROLINA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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QUESTION PRESENTED

Where the State does not contend that there is any confusion as to the time of the offense specified in the Bill of Indictment, and where, in fact, all of the State's evidence unequivocally supports the date as alleged in the indictment and no other date, and where the defendant relies on the time as so specified by the State as a defense and the defendant's evidence, if believed, establishes that the offense could not have occurred on that date, does it undermine the defendant's reliance on the date alledged in the indictment and supported by all of the State's evidence and is the defendant's own evidence used to entrap and ensnare him thereby depriving him of a fair trial by denying him an opportunity to adequately present his defense in violation of his constitutionally protected right to due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the

United States for the Trial Judge to instruct the jury so as to permit a conviction which is at variance with the State's case by allowing the jury to consider dates other than that supported by the State's evidence and which is supported by the defendant's own defense?

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

MARK SUMMITT,
Petitioner,

vs.

STATE OF NORTH CAROLINA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF NORTH CAROLINA

OPINIONS BELOW

The opinion of the Supreme Court of North Carolina below (Appendix A, infra, p. A1) is reported in ____N.C.____, S.E.2d ____. The opinion of the North Carolina Court of Appeals below (Appendix B, infra, p. A37) is reported in 45 N.C. App. 481, 263 S.E.2d 612.[1]

---

1. The parties to the proceeding in the Supreme Court of North Carolina below, whose judgment is sought to be reviewed, and in the North Carolina Court of Appeals and the state trial court, were the State of North Carolina and the Defendant, Mark Summitt, the same parties as are contained in the caption in this Court. In the trial court the State of North Carolina was represented by the Honorable Joseph G. Brown, District Attorney for the Twenty-Seven (A) Judicial District, Gaston County, North Carolina, and by Assistant District Attorney James Stroud. In the North Carolina Court of Appeals and in the Supreme Court of North Carolina, the State was represented by the Honorable Rufus L. Edmisten, Attorney General for the State of North Carolina, and John R. B. Matthis, Special Deputy Attorney General, and Alan S. Hirsch, Assistant Attorney General. The defendant was represented in the trial court, the North Carolina Court of Appeals and the Supreme Court of North Carolina by Frank Patton Cooke, Esquire. He was also represented in the Court of Appeals by James R. Carpenter. He was also represented in the Supreme Court of North Carolina by Kenneth B. Oettinger.

JURISDICTION

The judgment of the Supreme Court of North Carolina below (Appendix A, infra, p. A1) was entered and filed on the 6th day of January, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fourteenth Amendment, §1, Constitution of the United States, which provides in part:"...nor shall any state deprive any person of life, liberty, or property, without due process of law."

2. Article I, Section 19 of the Constitution of North Carolina, which provides in part: "No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the

law of the land..."

3. Article I, Section 23 of the Constitution of North Carolina, which provides in part: "In all criminal prosecutions, every person charged with crime has the right to be informed of the accusation and to confront the accusers and witnesses with other testimony, and to have counsel for defense, and not be compelled to give self-incriminating evidence...."

4. The statute under which Petitioner was prosecuted was North Carolina General Statutes §14-21 (repealed effective 1 January 1980), which provided as follows: (Appendix C, infra, p. A49).

STATEMENT OF THE CASE

The facts necessary to place in its setting the question now raised can be briefly stated:

A. Course of Proceeding in the State Courts of North Carolina in the case now before this Court.

The Defendant-Petitioner was charged in Gaston County, North Carolina, in bill of indictment number 79 CRS 5134 with the first-degree rape of his eleven-year-old niece, Sherry Lynn Knight. The bill of indictment reflected that this alleged incident occurred on March 24, 1978. The Defendant-Petitioner was also charged with the second-degree rape of this same niece in bill of indictment number 79 CRS 5133. The bill of indictment reflected that this second alleged incident occurred on July 28, 1978. The charges were consolidated for trial, and the defendant entered a plea of not guilty to each

charge. The cases were tried before his Honor, Judge Robert M. Burroughs at the May 21, 1979 Session of the Gaston County, North Carolina, Superior Court in the Twenty-Seven (A) Judicial District, Gastonia, North Carolina. The jury returned a verdict of not guilty as to the charge contained in indictment number 79 CRS 5133 and a verdict of guilty of the lesser-included offense of second-degree rape as to the charge contained in indictment number 79 CRS 5134. Judgment was entered on May 29, 1979, and the defendant was sentenced to a term of not less than ten nor more than fifteen years in prison.

In apt time, the Defendant-Petitioner alleged, among other things, that he had been denied his constitutional right to due process and served Notice of Appeal to the North Carolina Court of Appeals, which, in a unanimous opinion, found no error and affirmed his conviction of rape

in the second degree in case number 79 CRS 5134. The defendant again alleged a denial of his constitutional right to due process and gave Notice of Appeal to the Supreme Court of North Carolina. In the alternative, the Defendant-Petitioner petitioned the Supreme Court of North Carolina for discretionary review pursuant to North Carolina General Statutes §7A-31. (Appendix D, infra, p. A51).

The Attorney General for the State of North Carolina moved to dismiss the Defendant-Petitioner's appeal on 24 April 1980. However, the Supreme Court of North Carolina allowed the Defendant's Petition for Discretionary review on 3 June 1980 and denied the Attorney General's motion to dismiss the appeal on the same date.

In an opinion filed on 6 January 1981, the Supreme Court of North Carolina, in a split decision vote of four to two,

affirmed the Defendant-Petitioner's conviction in case number 79 CRS 5134. Associate Justice Exum wrote a dissenting opinion, stating that the Defendant had been denied a fair trial in violation of his constitutionally protected right to due process. Associate Justice Copeland joined in this dissent.

Consequently, the Defendant-Petitioner is herein filing a Petition for Writ of Certiorari to the Supreme Court of the United States.

B. Relevant facts concerning the underlying conviction for rape in the second degree.

The Defendant-Petitioner was charged in the two indictments with two separate rapes of his niece, Sherry Knight. The first indictment alleged that the Defendant first raped his niece on 24 March 1978. The second indictment alleged that the Defendant again raped his niece on 28

July 1978. Both charges were brought pursuant to former North Carolina General Statutes §14-21 (repealed effective 1 January 1980).

At trial, the prosecuting witness, Sherry Knight, testified unequivocally that the March incident took place on "the Friday before Easter last year." Easter in 1978 was on March 26. Therefore, Sherry's testimony was in accord with the indictment that the date of the March incident was March 24. In addition, she tied the time of the incident to the occasion when the Defendant-Petitioner, to whom she referred as "Uncle Mark," picked her up to go buy her an Easter dress. She testified that on this occasion he took her back to his home, where, being along, they engaged in sexual intercourse. She further said that about "five or ten minutes later" the Defendant's wife, to whom Sherry referred

as "Aunt Linda," came in and the three of them "went and got my Easter dress."

As to the exact date of the July incident, Sherry was less clear. The essence of her testimony was that it occurred sometime during the summer of 1978. During cross-examination when the attorney for Defendant-Petitioner was attempting to elicit from Sherry the exact date of the July incident, the District Attorney stated in the presence of the jury that, in fact, he was the one who had picked out the date of July 28 and inserted it in the indictment. According to the District Attorney, the prosecuting witness herself did not arrive at that date.

Sherry Knight did not report these incidents to anyone until March of 1979, a year after the March 24, 1978, incident allegedly happened. She admitted on the witness stand that she "used to have a problem about lying, but it was before

anything like this ever happened. I don't know who I lied to, or what I lied about. I remember I used to lie...."

The Defendant-Petitioner testified in his own behalf and offered corroborating witnesses. He denied being with the prosecuting witness on the dates alleged in the indictments. With regard to the dates of July 26, 27 and 28, the Defendant's testimony tended to show that he, a gospel singer, was out of the State engaged in recording sessions in South Carolina. With regard to the March incident, the Defendant's evidence tended to show as follows: On Tuesday, March 14, the Defendant and his wife picked up Sherry at her home and took her to Sears where they bought her an Easter dress as they had done the year before. After the purchase, they returned Sherry to her home. On Friday, March 17, the Defendant and his wife again picked up Sherry at her home

and took her back to the Defendant's home where she spent the weekend. Sherry slept in another bedroom with a lady friend of the Summitts on Friday and Saturday nights. The Defendant was never along with Sherry in his home during this weekend. Both the wife of the Defendant and the lady friend of the Summitts took the witness stand and corroborated this testimony.

On this state of the evidence, the trial judge instructed the jury regarding the July incident that the State "must be held to July 27, July 28 or July 29, 1978 ...." He gave no such limiting instructions with regard to the March incident, saying only that the jury would have to find that the March rape occurred "on or about March 24." The Defendant-Petitioner was acquitted in the July case but was convicted of second-degree rape in the March case.

C. The stage in the proceeding at which the federal question sought to be reviewed was raised; the method of raising it; and way in which passed upon by court.

The trial judge, in his charge to the jury, failed to give a limiting instruction restricting them to find that the March incident occurred on March 24, 1978. Instead, he charged that the jury would have to find that the alleged March rape occurred "on or about March 24." (See record pp. 193, 194, 195, 196 and as set out in Appendix E, infra, p. A54)

In the North Carolina Court of Appeals, the Defendant-Petitioner alleged that the trial judge's instruction as to the time of the March incident was improper and constituted reversible error and that even though it has been held that the date of the crime as named in the bill of indictment is not usually an essential

element of the crime, and the State may prove that it was in fact committed on some other date, nevertheless, it is a violation of the basic constitutional guarantee of a fair trial for the State to place a date on the indictment, then offer evidence of a specific time on the State's case in chief, and after the defendant offers evidence which, if believed, would establish that the offense could not have occurred on that date, for the jury to be allowed to consider dates other than that supported by the State's evidence. (See Defendant-Appellant's Brief filed in the North Carolina Court of Appeals pp. 13-15 and as set out in relevant part in Appendix F, infra, p. A63) The North Carolina Court of Appeals rejected this contention and found no error in this instruction on the ground that the Defendant had offered an alibi defense for the July 28 incident but not for

the March 24 one. Thus, the Court of Appeals reasoned that the trial judge was not required to limit the jury's consideration to the date of March 24. (State of North Carolina v. Summitt, 45 N.C. App. 481, 485-486, 263 S.E.2d 612 (1980)); set out in Appendix B, p. A37)

In his Notice of Appeal filed in the Supreme Court of North Carolina, the defendant again asserted that his basic constitutional right to a fair trial was violated by the failure of the trial judge to give a limiting instruction restricting the time of the March incident, just as he had as to the July offense. (See Notice of Appeal to the Supreme Court of North Carolina, pp. 2-3 and as set out in relevant part in Appendix G, infra, p. A69). The Defendant also argued this is his brief filed with the Supreme Court of North Carolina. (See Defendant-Appellant's new brief filed in

the Supreme Court of North Carolina, pp. 13-17 and as set out in relevant part in Appendix H, infra, p. A72). The majority opinion in the Supreme Court rejected this contention, stating that the jury's consideration of the crime was restricted to the defendant's actions on or about 24 March 1978. (State of North Carolina v. Summitt, ___ N.C. _____, _____, _____ S.E.2d _____(1981); set out in Appendix A, infra, p. A1). The dissent, however, written by Justice Exum, agreed that the Defendant's constitutionally protected right to due process of law had been violated by the failure of the trial court to give the jury a limiting instruction as to the time of the March incident, just as he had for the July charge. (State v. Summitt, supra, p._____)

ARGUMENT

Although at trial the Defendant-Petitioner did not attempt to establish where he was on March 24, 1978, he did testify that he was not with the prosecuting witness on that date and had never been with her at any time alone. Nevertheless, because he admitted being with Sherry on several dates in March close to March 24, this date is as crucial in the case based upon the March incident as is the date of July 28 in the case based upon that incident.

The prosecuting witness, Sherry Knight, testified with no uncertainty, that the rape occurred on March 24. She also tied the incident to the time the Defendant picked her up for the purpose of going to get her Easter dress. The Defendant admitted being with Sherry when he and his wife bought her Easter dress, but he

stated that this occurred on Tuesday, March 14 and not on Friday, March 24. The Defendant also admitted that he was with the prosecuting witness on March 17 through March 19, the weekend she spent in the Defendant's home. At all these times, according to the defendant's testimony and the corroborating testimony of his wife and other witnesses, someone other than the prosecuting witness and the Defendant was always present. The Defendant and the prosecuting witness were never alone. However, under Judge Burrough's instructions, the jury was permitted to consider whether the alleged rape was committed on dates other than March 24. Left to roam in the month of March for possible dates upon which the rape might have occurred, the jury might well have seized upon the dates on which the Defendant admitted being with the pro-

secuting witness. This is particularly likely since the prosecuting witness tied the rape incident to the date when the Defendant bought her her new Easter dress. By permitting the jury to consider these dates after all of the Defendant's evidence was in, the trial judge undermined the Defendant's legitimate reliance on the date alleged in the bill of indictment and testified to by the prosecuting witness, and, thus, ensnared the Defendant in his own defense. If the evidence presented by the State had indicated uncertainty as to the exact date, the Defendant would have been put on notice that the State was not relying on March 24 but that it was relying on some date at or about that time. If this had been the case, the Defendant might well have elected not to take the witness stand and testify, because in order to do so, he would have to

admit that he was with Sherry at or about the time the State contended the rape occurred, but that he did not rape her.

When the indictment alleged and the State's evidence proved the date of the offense to have been March 24, the Defendant relied thereon and chose to testify: That he never raped the prosecuting witness and was with her only on days other than the one alleged by the State in the bill of indictment and testified to by Sherry. By then permitting the jury to consider these other days, the trial court permitted, in effect, the jury to convict the Defendant upon a theory which was not alleged in the bill of indictment and not supported by the State's evidence, but which was supported, at least in part, by the Defendant's own testimony.

Therefore, the Defendant was entitled to rely on the March 24 date in considering what defense, if any, he could offer.

His testimony as to being with Sherry on several occasions in March of 1978 would not have been damaging to his defense except for the later instruction given by Judge Burroughs. Since the Defendant based his defense not only upon the fact that he did not rape the prosecuting witness, but also upon the fact that he was not even with her on the date alleged, the trial judge should have required the jury to find that the Defendant committed the act alleged, if at all, on March 24. Had he done so, the jury would have been free to utilize all the Defendant's testimony against him. The jury would then have had to decide whether the Defendant committed the act <u>on the date alleged</u>. By in effect allowing the jury to select other dates as the date of the crime, the trial court allowed the Defendant's evidence, evidence which would have been helpful to him given a proper instruction, to be utilized to

convict him.

All of the State's evidence is that the alleged rape occurred on March 24, 1978, the Friday before Easter, and that this was the day that the Defendant took his niece to buy her Easter dress. It is only the Defendant's testimony combined with that of the prosecuting witness which could support a date for the rape other than March 24. Thus, the Court's instructions regarding the March incident served to entrap the Defendant with his own defense.

The Defendant was entitled to be put in a position to decide whether or not to testify at all and what defense, if any, he should offer in reliance upon what the State alleged and tried to prove with regard to the date, time, and nature of the offense. The Defendant did so rely and offered his defense accordingly. Thus, it denied the Defendant the rudiments of

due process when Judge Burroughs instructed the jury so as to permit a conviction which is both at variance with the State's case and supported only by the Defendant's own defense.

Associate Justice Exum, in writing the dissenting opinion for this case in the Supreme Court of North Carolina, agreed with this contention of the Defendant and espoused this position.

While it is well-settled that the time specified in a bill of indictment is not usually an essential element of the crime charged, and the prosecution may prove by its evidence that it was in fact committed on some other date [Ledbetter v. United States, 170 U.S. 606, 42 L.Ed. 1162, 1164, 18 S.Ct. 774, 776(1898); State v. Wilson, 264 N.C. 373, 377, 141 S.E.2d 801, 804 (1965); accord, State v. Davis, 282 N.C. 107, 191 S.E.2d 664 (1972); State v. Trippe,222 N.C. 600,24 S.E.2d 340 (1943)],

when a Defendant relies on time as a defense and the time specified in the bill of indictment is the same as the time shown by the evidence for the prosecution and the Defendant's evidence, if believed, establishes that the offense could not have occurred on that date, the Defendant's evidence can not be used to entrap or ensnare him and thereby deprive him of a fair trial by denying him an opportunity to adequately present his defense.

I have found no federal cases which address themselves directly to the issue at bar in this case and, thus, believe this to be a matter of first impression before this Court.

However, the Defendant, in his briefs filed with both the North Carolina Court of Appeals and the Supreme Court of North Carolina, took the position that this case fell within the purview of the decision rendered by the Supreme Court of North

Carolina in the case of State of North Carolina v. Whittemore, 255 N.C. 583, 122 S.E.2d 396 (1961). Justice Exum, in his dissent, agreed. The Whittemore case involved the sexual abuse of minors.

The defendants there, just as the Defendant here, relied on the time fixed in the bill of indictment in preparing for trial. At trial they relied on the State's evidence in putting up their own defense. In Whittemore the defense was alibi. In the case at bar, strictly speaking, the defense was not alibi with regard to the March incident. Nevertheless, the Defendant in this case relied on the date of March 24 as being the date of the alleged crime, equally as strong as the defendants' similar reliance in Whittemore. The defendants in Whittemore were given a new trial because the State in rebuttal offered evidence of offenses committed on other dates, and the trial court instruct-

ed the jury that they could consider dates other than that charged in the bill of indictment.[2]

The case at bar is analogous to the Whittemore case in that the State here does not contend that there was confusion as to the time named in the bill and, in fact, its evidence unequivocally supports the date alleged and no other. Further, just as in Whittemore, the State, through the trial judge's jury instructions, is permitted to rely on other dates after the Defendant's evidence has come in.

Since in the July case Judge Burroughs gave a specific limiting instruction to the jury restricting the jury's consideration to the date charged in the bill of indictment and the dates immediately preceding and immediately following that date, but he did not so limit it with regard to

2. State of North Carolina v. Whittemore, supra; opinion set out in Appendix J, infra, p. A83 .

the March incident, the jury undoubtedly felt that they could consider other dates in March. This error in the judge's jury instructions denied the Defendant a fair trial in keeping with the dictates of due process as guaranteed by the Fourteenth Amendment, §1 of the Constitution of the United States and by Article I, Sections 19 and 23 of the Constitution of North Carolina.

This Court has long held that "The Fourteenth Amendment is a protection against criminal trials in state courts conducted in such a manner as amounts to a disregard of 'that fundamental fairness essential to the very concept of justice,' and in a way that 'necessarily prevents a fair trial.'" Lyons v. State of Oklahoma, 322 U.S. 596, 88 L.Ed. 1481, 1487, 64 S.Ct. 1208, rehearing denied 323 U.S. 809, 89 L.Ed. 645, 65 S.Ct. 26 (1944); Lisenba v. California, 314 U.S. 219, 86 L.Ed. 166,

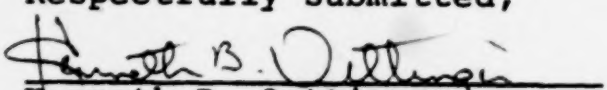
180, 62 S.Ct. 280 (1941). "The right of an accused in a criminal case to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294, 35 L.Ed.2d 297, 308, 93 S.Ct. 1038 (1973); Quigg v. Crist, (D.C. Mont. 1978) 466 F.Supp. 544, 550. Justice, fairness and reasonableness in view of all the facts and circumstances of a particular case are the touchstones for the application of this clause.

Applying these principles to the specific facts of the case at bar, it is apparent that the Defendant was not afforded a fair opportunity to defend against the State's accusations, and the proceedings at trial were so fundamentally unfair as to be inconsistent with the rudimentary demands of fair procedure and with the very concept of justice.

CONCLUSION

In the trial court the Defendant-Petitioner's own evidence was used to entrap and ensnare him thereby depriving him of a fair trial by denying him an opportunity to adequately present his defense, in violation of his constitutionally protected right to due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States. The judgment below in the Supreme Court of North Carolina decides an important federal question which has not been, but should be, settled by the Supreme Court of the United States. This Petition for Writ of Certiorari should, therefore, be granted.

Respectfully submitted,



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APPENDIX A

SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA)
)
V.) No. 41 - Gaston
)
MARK SUMMITT)

(Filed Jan. 6, 1981)

On petition for discretionary review of decision of the Court of Appeals, 45 N.C. App. 481, 263 S.E.2d 612, finding no error in the trial before Burroughs, J., at the 21 May 1979 Session of Gaston Superior Court.

Defendant was charged in bill of indictment number 79CRS5134 with the first-degree rape of his eleven-year-old niece, Sherry Lynn Knight. He was also charged with the second-degree rape of the same person in bill of indictment number 79CRS5133. The charges were consolidated for trial, and defendant entered a plea of not guilty to each charge. The indictment for second-

degree rape in indictment number 79CRS5133 is not before us on this appeal since the jury returned a verdict of not guilty on that charge.

The prosecuting witness testified that on or about 24 March 1978, defendant came to her home and carried her to his home. Defendant told her at that time that he and his wife were going to take her to buy an Easter dress. Upon arriving at defendant's home, she discovered that his wife was not at home, and shortly thereafter defendant proceeded to have intercourse with her. Sherry testified that she had never had intercourse before that date and that she did not tell her mother about this incident until sometime in March, 1979. After she told her mother of this assault, her mother called the police, and Sherry related substantially the same facts to the police. The witness's mother and

police officers corroborated the prosecuting witness's testimony by relating statements that she made to them on that day.

A medical examination performed in March, 1979, indicated that the prosecuting witness had engaged in intercourse at some prior time.

Defendant testified that he had never transported the prosecuting witness anywhere unless someone else was in the car and that his wife was with him when they picked Sherry up on the date in question. Defendant offered corroborative testimony and also offered evidence of his good character.

In rebuttal, the State offered a witness who testified concerning a conversation with the prosecuting witness in which she told the witness of an attack upon her by defendant.

On the charge of first-degree rape on

or about 24 March 1978, the trial judge submitted the possible verdicts of guilty or not guilty of first-degree rape, guilty or not guilty of second-degree rape, guilty or not guilty of assault with intent to commit rape and guilty or not guilty of assault on a female. Before the trial judge instructed the jury, defendant objected to the submission of the lesser-included offenses. His objection was overruled. The jury returned a verdict of guilty of second-degree rape, and the trial judge entered judgment imposing a prison sentence of not less than ten nor more than fifteen years. Defendant appealed. The Court of Appeals in a unanimous opinion found no error, and defendant gave notice of appeal. In the alternative, defendant petitioned this Court for discretionary review pursuant to G.S. 7A-31. The Attorney General moved to dismiss defendant's appeal on 24 April 1980. We allowed defen-

dant's petition for discretionary review on 3 June 1980 and denied the Attorney General's motion to dismiss on the same date.

RUFUS L. EDMISTEN, Attorney General, by JOHN R. B. MATTHIS, Special Deputy Attorney General, and ALAN S. HIRSCH, Assistant Attorney General, for the State.

FRANK PATTON COOKE, by KENNETH B. OETTINGER, for defendant appellant.

BRANCH, Chief Justice.

Defendant assigns as error the action of the trial judge in submitting to the jury, over his objection, the lesser-included offense of second-degree rape. Defendant argues that it was error to submit the lesser-included offense of second-degree rape because there was no evidence from which the jury could find that he committed that offense. Defendant was charged under the provisions of former G.S. 14-21, repealed effective 1 January 1980 which provided:

Every person who ravishes and carnally knows any female of the age of 12 years or more by force and against her will, or who unlawfully and carnally abuses any female child under the age of 12 years, shall be guilty of rape, and upon conviction, shall be punished as follows:

(1) First-Degree Rape -

a. If the person guilty of rape is more than 16 years of age, and the rape victim is a virtuous female child under the age of 12 years, the punishment shall be death; or

b. If the person guilty of rape is more than 16 years of age, and the rape victim had her resistance overcome or her submission procured by the use of a deadly weapon, or by the infliction of serious bodily injury to her, the punishment shall be death.

(2) Second-Degree Rape - Any other offense of rape defined in this section shall be a lesser-included offense of rape in the first degree and shall be punished by imprisonment in the State's prison for life, or for a term of years, in the discretion of the court.

The trial judge gave the following in-

structions to the jury on second-degree rape:

> If you do not find the defendant guilty of first-degree rape, you must decide whether he is guilty of second-degree rape. Second-degree rape differs from first-degree rape in that it is not necessary for the State to prove that the defendant was more than sixteen years of age or that Sherry Lynn Knight was virtuous.
>
> So, I charge that if you find from the evidence beyond a reasonable doubt that on or about March 24, 1978, Mark Summitt had sexual intercourse with Sherry Lynn Knight who at that time had not reached her twelfth birthday, it would be your duty to return a verdict of guilty of second-degree rape. However, if you do not so find or have a reasonable doubt as to one or both of these things, you will not return a verdict of guilty of second-degree rape.
>
> * * *
>
> Now, Members of the Jury, I want to instruct you as to second-degree rape because in my earlier charge to you I left out a portion of it.
>
> If you do not find the defendant guilty of first-degree rape, you must decide whether he is guilty of second-degree rape. Second-degree rape differs from first-

> degree rape in that it is not necessary for the State to prove the defendant was more than sixteen years of age or that Sherry Lynn Knight was virtuous.
>
> So, I charge that if you find from the evidence beyond a reasonable doubt that on or about March 24, 1978, Mark Summitt had sexual intercourse with Sherry Lynn Knight who at that time had not reached her twelfth birthday, it would be your duty to return a verdict of guilty of second-degree rape.

The trial judge must submit and instruct the jury on a lesser-included offense when, and only when, there is evidence from which the jury can find that a defendant committed the lesser-included offense. Conversely, when all the evidence tends to show that defendant committed the crime charged in the bill of indictment and there is no evidence of the lesser-included offense, the court should refuse to charge on the lesser-included offense. State v. Redfern, 291 N.C. 319, 230 S.E.2d 152 (1976). The presence of evidence to support conviction

of the lesser-included offense is the determinative fact. State v. Harris, 290 N.C. 681, 228 S.E.2d 437 (1976).

Evidence would be sufficient to carry a case to the jury on a charge of second-degree rape of a twelve-year-old child pursuant to G.S. 14-21 when the evidence fails to support any one of the elements of first-degree rape enumerated in G.S. 14-21(1)(a), to wit, (1) the age of the prosecuting witness is less than twelve years old, (2) the age of defendant is more than sixteen years old, (3) the virtuous character of the prosecuting witness. Neither defendant nor the State contends that the age of the prosecuting witness or the age of defendant is in doubt. The State contends however that evidence exists in the record to support the submission and an instruction on the lesser offense since there was sufficient evidence to permit the jury to find that

the prosecuting witness was not virtuous.

The State emphasizes two aspects of the evidence to support the instruction on the lesser offense. First, the State points to the medical evidence which indicated that the victim had previously engaged in sexual intercourse. Second, the State notes that during the prosecuting witness's testimony she twice stated that the rape did not cause any bleeding. The State contends that this evidence is sufficient to support a reasonable inference that the prosecuting witness was not virtuous.

The standard to determine whether a charge should be submitted to a jury is the "more than a scintilla of evidence" test. The classic statement of the test comes from Stacy, C.J., in State v. Johnson, 199 N.C. 429, 431, 154 S.E. 730, 731(1930), where he states:

> It is sometimes difficult to distinguish between evidence suffi-

> cient to carry a case to the jury, and a mere scintilla, which only raises a suspicion or possibility of the fact in issue. (Citations omitted.) The general rule is that, if there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury.

The medical evidence relied upon by the State cannot be considered in support of its position. The examination of the prosecuting witness took place about a year after the incident and, while relevant to the issue of prior sexual activity as some evidence of defendant's guilt, the evidence is irrelevant as to the question of the victim's condition at the time of the alleged rape. Nothing in the doctor's testimony gives the jury a time frame from which it could reasonably conclude that the prosecuting witness was not virtuous on or before March, 1978.

The prosecuting witness's testimony that she did not bleed when she had her encounter with defendant does have some tendency to support the inference that she was not virtuous at the time of the incident. However, without more we cannot say that this meets the standard which would permit the case to go to the jury. It is common knowledge that a female person's hymen may be ruptured by many means other than sexual intercourse. Thus, in our opinion, the evidence relied upon by the State to support an inference that the prosecuting witness was not virtuous does not rise above a scintilla. The evidence may raise "a suspicion or conjecture," but it does not support "a fairly logical and legitimate deduction." Therefore, it was error for the trial judge to submit to the jury and instruct on the lesser-included offense of second-degree rape.

We turn to the question of whether the

erroneous submission of the lesser-included offenses was so prejudicial to defendant as to warrant a new trial.

For many years, it has been the rule in this jurisdiction that the erroneous submission of a lesser-included offense not supported by the evidence is error, but not prejudicial error. State v. Vestal, 283 N.C. 249, 195 S.E.2d 297 (1973); State v. Stephens, 244 N.C. 380, 93 S.E.2d 431 (1956); State v. Quick, 150 N.C. 820, 64 S.E. 168 (1909); State v. Alston, 113 N.C. 666, 18 S.E. 692 (1893). However, in State v. Ray, 299 N.C. 151, 261 S.E.2d 789 (1980), a new dimension was added to this rule by applying the harmless error test to the facts and circumstances peculiar to each case.

The harmless error test, other than in constitutional matters, requires a finding of prejudice to a defendant when there is a reasonable possibility that had the error

not been committed a different result would have been reached at the trial. State v. Ray, supra; 15A-1443.

In Ray the defendant was charged with first-degree murder and at the close of the evidence, the court submitted to the jury alternative verdicts of second-degree murder, manslaughter, involuntary manslaughter, not guilty and not guilty by reason of self-defense and defense of another. All the evidence disclosed that the defendant intentionally shot the victim and the only defense was self-defense and defense of another. Defendant was convicted of involuntary manslaughter, and his appeal presented the sole question of whether the court committed prejudicial error in submitting the alternative possible verdict of involuntary manslaughter.

In writing the majority opinion, Justice Exum (Justice Copeland dissenting,

and Chief Justice Branch joining in the dissent) reasoned that the trial judge erred in distinguishing involuntary manslaughter from manslaughter and second-degree murder by focusing on intent to kill rather than the presence of an intentional act, thereby "short-circuiting" the jury's consideration of defendant's claims of self-defense and defense of another. The majority further reasoned that, if the jury had been required to squarely face the real issue of self-defense or the right to defend another, there was a reasonable possibility that a verdict of not guilty might have resulted. In reversing the Court of Appeals' finding of no prejudicial error, Justice Exum, inter alia, wrote:

> We emphasize that the result reached here should not be read as casting any doubt on the validity of earlier decisions of this Court or of the Court of Appeals. Our decision today does no more

than recognize that a verdict based upon the erroneous submission of a lesser included offense not supported by the evidence does not invariably constitute error favorable to a defendant as a matter of law. Whether such an error is harmless depends instead upon the facts and circumstances peculiar to each case. We hold simply that the facts and circumstances peculiar to the instant case warrant a conclusion that, absent the erroneous submission on involuntary manslaughter, there is a reasonable possibility that the jury would have returned a verdict of acquittal. The error complained of was therefore prejudicial to the defendant. G.S. 15A-1442. . . .

* * *

The principle applied in our cases so far, then, is nothing more than an application of the well recognized doctrine of harmless error, now codified in G.S. 15A-1442 and G.S. 15A-1443. Stated simply, that doctrine provides that only those errors which prejudice a defendant will entitle him to relief on appeal. G.S. 15A-1442. And a defendant is "prejudiced" by errors other than constitutional ones only when "there is a reasonable possibility that, had the error in question not been committed, a different result [favorable to defendant] would have been

> reached at the trial . . . ."
> G.S. 15A-1443. Thus, where there is no reasonable possibility that a verdict more favorable to defendant would have occurred absent an erroneous instruction on a lesser offense not supported by the evidence, the error occasioned by such instruction is harmless. Conversely, where there does exist a reasonable possibility that defendant would have been acquitted had not the lesser offense been erroneously submitted, the error is prejudicial and defendant is entitled to appellate relief.

Id. at 167 and 163-64, 261 S.E.2d at 799 and 797.

The instant case is not governed by Ray. The case sub judice is controlled by the rule set out in the original line of cases represented by State v. Vestal, supra. We are of the opinion that the language in State v. Quick, supra, accurately sets forth the rule and its rationale.

In Quick the defendant was charged with second-degree murder and convicted of voluntary manslaughter. On appeal he contended that there was no evidence to sup-

port the charge of the lesser-included offense. Although the Court found there was evidence to support the lesser charge, the Court in a dictum statement wrote:

> Suppose the court erroneously submitted to the jury a view of the case not supported by evidence, whereby the jury were permitted, if they saw fit, to convict of manslaughter instead of murder, what right has the defendant to complain? It is an error prejudicial to the State, and not to him. His plea of self-defense had been fully and fairly presented to the jury and rejected by them as untrue. What, then, was the duty of the jury, if there was no evidence of manslaughter? Clearly, under the law, they should have convicted the defendant of murder in the second degree.

Id. at 823-24, 64 S.E. at 170.

In instant case, defendant's sole defense was that he did not commit the act upon which the greater and lesser offenses were based. There is no contention that there was anything in the charge to the jury which clouded that defense. Thus, the jury's verdict finding him guilty of second-degree rape implicitly, but clearly,

rejected his defense that he did not commit the act upon which the charges were based. When the jury discarded defendant's sole defense, all the evidence pointed to the greater crime of first-degree rape. Therefore, the submission of the lesser-included offense was not prejudicial to defendant but to the contrary was in his favor.

Defendant next assigns as error the failure of the trial judge to grant his motion for judgment as of nonsuit. He contends that the State's evidence was so inconsistent that it could not support a verdict of guilty.

In support of his position, defendant relies upon the case of State v. Williams, 185 N.C. 685, 116 S.E. 736 (1923), which stands for the proposition that a case of this nature should be subjected to close examination and scrutiny by the jury.

A motion for judgment of nonsuit is

correctly denied if there is competent evidence to support the allegations contained in the bill of indictment. Evidence tending to support these allegations must be considered in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from such evidence. State v. Bell, 285 N.C. 746, 208 S.E. 506 (1974). Further, this Court has consistently applied the rule that contradictions and discrepancies are for the jury to resolve and the presence of such contradictions and discrepancies does not warrant nonsuit. State v. McKinney, 288 N.C. 113, 215 S.E.2d 578 (1975). Here the prosecuting witness testified that defendant had intercourse with her on or about Friday before Easter. She testified that she was born on 18 November 1966 and therefore was under the age of twelve years old at that time. She also testified that she had never had sexual

intercourse with anyone prior to the incident on or about the Friday before Easter in the year 1978. The fact that defendant was over sixteen years of age was not contested.

Applying the above-stated rules of law, we hold that there was plenary evidence to carry the case to the jury.

Defendant contends that the trial judge erred by permitting the witness, Linda Harris, to testify concerning a conversation she had with the prosecuting witness in the fall of 1978. Defendant takes the position that the witness's testimony had the effect of altering the date fixed in the bill of indictment. Our careful examination of this record discloses that the witness, Linda Harris, made no statement as to the date of the alleged incident.

Finally, defendant contends that he was denied a fair trial because of the court's instructions as to the date of the offense.

He contends that, because the judge expressly instructed the jury as to the date of the July charge and did not so instruct on the 24 March charge, that the jury was left with the impression that the date of that crime was of no concern. The record reveals an exchange between defense counsel and the prosecutor concerning the July charge which necessitated the instruction there given. A contextual reading of the record makes it clear that the jury's consideration of the crime of which defendant stands convicted was restricted to his actions on or about 24 March 1978. The record reveals nothing indicating that defendant was surprised or hampered by any attempt of the State to alter the date charged in the bill of indictment. Defendant clearly had full opportunity to meet the State's evidence and did squarely meet the State's evidence concerning his actions on or about 24 March

1978. The jury chose to believe the evidence offered by the State.

We are constrained to note that because of the discrepancies and contradictions in the evidence and the long delay before the prosecuting witness made an accusation, a very close question was presented to the jury as to defendant's quilt or innocence. Nevertheless, our careful review of this record discloses no error warranting a new trial. Any relief for defendant must, therefore, come from the Executive Branch.

The decision of the Court of Appeals is AFFIRMED.

Justice Brock did not participate in the consideration or decision of this case.

Justice Exum dissenting.

The majority, disturbed about the result in this case, suggests that defendant might get relief from the Executive Branch. Because of a serious legal error in the

trial, prejudicial to defendant, but not really dealt with in the majority opinion, I see no need to defer the matter to the Governor. This Court should recognize the error and order a new trial on the basis of it.

Defendant was charged in two indictments with two different rapes of his niece, Sherry Knight. The first indictment alleged that a rape occurred on 24 March 1978. The second indictment alleged that a second rape occurred on 28 July 1978.

Easter in 1978 fell on March 26. The prosecuting witness, Sherry Knight, testified unequivocally that the March incident took place "the Friday before Easter last year." Thus she testified in accord with the indictment that the date of the March incident was March 24. She also tied the incident to the time that defendant, to whom she referred as "Uncle Mark," picked her up to go get her Easter dress. She

said that on this occasion he took her back to his home where, being alone, they engaged in sexual intercourse. About "five or ten minutes later" defendant's wife, to whom Sherry referred as "Aunt Linda," came in and the three of them "went and got my Easter dress." Sherry was less clear as to the date of the July incident. She testified, in essence, that it happened sometime during the summer of 1978. During cross-examination when defendant was trying to elicit from Sherry the date of the July incident the district attorney stated before the jury that, in fact, he had picked out the date of 28 July and inserted it in the indictment. The witness, herself, according to the district attorney, did not arrive at that date. Sherry did not report these incidents until March 1979. She admitted that she "used to have a problem about lying, but it was before anything like this ever happened. I don't

know who I lied to, or what I lied about. I remember I used to lie . . . ."

Defendant testified in his own behalf and offered corroborating witnesses. He denied being with the prosecuting witness on the dates alleged in the indictments. With regard to the dates of July 26, 27 and 28 defendant's testimony tended to show that he, a gospel singer, was out of the state engaged in recording sessions in South Carolina. With regard to the March incident defendant's evidence tended to show as follows: On Tuesday, March 14, defendant and his wife picked up Sherry at her home and took her to Sears where they bought her an Easter dress as they had done the year before. After the purchase they returned Sherry to her home. On Friday, March 17, defendant and his wife again picked up Sherry at her home and took her back to defendant's home where

she spent the weekend. Sherry slept in another bedroom with a friend of the Summitts on Friday and Saturday nights. Defendant was never alone with Sherry in his home during this weekend.

On this state of the evidence the trial judge instructed the jury regarding the July incident that the state "must be held to July 27, July 28, or July 29, 1978 . . . ." He gave no such limiting instructions with regard to the March incident, saying only that the jury would have to find that the March rape occurred "on or about March 24." Defendant was acquitted in the July case but convicted in the March case.

The Court of Appeals found no error in this instruction on the ground that defendant had offered an alibi defense for July 28 but not for March 24. The trial judge, reasoned the Court of Appeals, was not required to limit the jury's consider-

ation to the date of March 24.

It is true that defendant did not attempt to establish where he was on March 24. He testified, in effect, that he was not with the prosecuting witness on that date and had never been with her at any time alone. Nevertheless because defendant admitted being with the prosecuting witness on several dates in March close to March 24, this date to me looms as crucial in the case based upon the March incident as does the date of July 28 in the case based upon that incident.

The prosecuting witness testified unequivocally that the rape occurred on March 24. She also tied the incident to the time defendant picked her up for the purpose of going to get her Easter dress. Defendant admitted being with the prosecuting witness when he bought her Easter dress but said that this was on Tuesday, March 14. He also admitted being with the

prosecuting witness on March 17 through 21, the weekend she spent in defendant's home. At all these times, according to defendant's testimony, someone other than the prosecuting witness and defendant was always present. Defendant and the prosecuting witness were never alone. Under the judge's instructions, however, the jury was permitted to consider whether the rape was committed on dates other than March 24. Left to roam in the month of March for possible dates upon which the rape might have occurred, the jury might well have seized upon the dates on which defendant admitted being with the prosecuting witness. This is particularly likely since the prosecuting witness tied the rape incident to the date when defendant bought her her new dress. By permitting the jury to consider these dates after defendant's evidence was in, the trial judge undermined defendant's legitimate reliance on the date alleged in

the bill of indictment and testified to by the prosecuting witness, and thus ensnared defendant in his own defense. In other words, had the state's evidence indicated uncertainty as to the exact date, defendant would have been on notice that the state was not relying on March 24 but that it was relying on some date at or about that time. Defendant might well have chosen not to testify at all, because to do so truthfully he would have to admit that he was with the victim although he did not rape her at or about the time the state contended the rape occurred. When the indictment alleged and the state's evidence proved the date of the offense to have been March 24, defendant, in reliance thereon, chose to testify as he did: that he never raped her and was with her only on days other than the one alleged by the state and testified to by the alleged victim. By then permitting the jury

to consider these other days, the trial court permitted, in effect, the jury to convict the defendant upon a theory which was not alleged in the bill of indictment and not supported by the state's evidence, but which was supported in part at least by defendant's own testimony.

Thus, in this case defendant, in considering what defense, if any, he could offer, was entitled to rely on the March 24 date. His testimony as to several March meetings with the prosecuting witness would not have been damaging to his defense but for the later instruction of the trial judge. Given that the defendant based his defense not only upon the fact that he did not rape the prosecuting witness, but also upon the fact that he was not even with her on the date alleged, the trial judge should have required the jury to find that defendant committed the act alleged, if at all, on March 24. Had he done so the jury would

have been free to utilize all the defendant's testimony against him. The jury would then have had to decide whether defendant committed the act on the date alleged. By in effect allowing the jury to select other dates as the date of the crime, the trial court allowed defendant's evidence, evidence which would have been helpful given a proper instruction, to be utilized to convict him.

It may be argued that the state offered some evidence that the rape occurred earlier than March 24 in the form of Sherry Knight's testimony that it happened on the day defendant took her to buy her Easter dress. All the state's evidence, however, is that this day was March 24, the Friday before Easter. It is only the defendant's testimony combined with that of Sherry Knight which could support a date for the rape other than March 24. The argument only serves to heighten the fact that the

court's instructions regarding the March incident served to entrap defendant with his own defense.

I do not mean to suggest that a defendant is denied a fair trial whenever his own testimony so implicates him in the offense that it likely leads to his conviction. Every defendant takes that risk when he chooses to testify in his own behalf. My point is that a defendant should be able to decide whether to testify at all and what defense, if any, he should offer <u>in reliance</u> on what the state has alleged and tried to prove with regard to the date, time, and nature of the offense. When a defendant does so rely and offers his defense accordingly, the trial judge ought not then instruct the jury so as to permit a conviction which is both at variance with the state's case and supported only by defendant's own defense. To do so, in my view, denies defendant the rudiments of

due process.

I think this principle is supported by State v. Whittemore, 255 N.C. 583, 122 S.E. 2d 396 (1961), a case also involving the sexual abuse of minors. Defendants there, just as defendant here, relied on the time fixed in the bill of indictment in preparing for trial. At trial they relied on the state's evidence in putting up their own defense. It is true that in Whittemore, the defense was alibi. Here, strictly speaking, the defense was not alibi with regard to the March incident. Nevertheless defendant's reliance on the date of March 24 as being the date of the alleged crime was equally as strong as the defendants' similar reliance in Whittemore. Defendants in Whittemore were given a new trial because the state in rebuttal offered evidence of offenses committed on other dates and the trial court instructed the jury that they could consider dates other than

that charged in the bill of indictment. The Court said, 255 N.C. at 592, 122 S.E. 2d at 403:

> "True the time named in a bill of indictment is not usually an essential ingredient of the crime charged, and the State may prove that it was in fact committed on some other date. G.S. 15-155; S. v. Bryant, 228 N.C. 641, 46 S.E.2d 847; S. v. Baxley, 223 N.C. 210, 25 S.E.2d 621; S. v. Trippe, 222 N.C. 600, 24 S.E.2d 340. But this salutary rule, preventing a defendant who does not rely on time as a defense from using a discrepancy between the time named in the bill and the time shown by the evidence for the State, cannot be used to ensnare a defendant and thereby deprive him of an opportunity to adequately present his defense. The State did not contend that there was confusion as to the time named in the bill of indictment. It insisted the date named was in fact the true date; but when defendants' evidence, if believed, would establish their innocence, it then contended the jury could, nevertheless, convict for the subsequent asserted wrongful acts." (Emphasis supplied.)

Just as in Whittemore the state here does not contend that there was confusion as to the time named in the bill; indeed its evi-

dence unequivocally supports the date alleged and no other. Also as in Whittemore, the state, through the trial judge's jury instructions, is permitted to rely on other dates after defendant's evidence has come in.

Had the trial judge not expressly limited the jury's consideration to three particular dates with regard to the July incident his charge regarding the March incident, standing alone, may have been free from error. His words, "on or about March 24" may then have been taken by the jury as meaning that date or the dates immediately preceding or following. Since in the July case he did limit the jury's consideration to the date charged in the indictment and the dates immediately preceding and following but did not so limit it with regard to the March incident, the jury undoubtedly felt that they could consider other dates in March.

This error in the instructions denied defendant a fair trial in keeping with the dictates of due process. State v. Whittemore, supra. I, therefore, vote for a new trial.

Justice Copeland joins in this dissent.

APPENDIX B

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA)
)
V.) No. 7927SC877
)
MARK SUMMITT)

(Filed 4 March 1980)

Appeal by defendant from Burroughs, Judge. Judgment entered 29 May 1979 in Superior Court, Gaston County, Heard in the Court of Appeals 7 February 1980.

Defendant was charged with two counts of rape. The first charged him with the second degree rape of his niece on or about 28 July 1978. The second charged him with the first degree rape of the same niece on or about 24 March 1978. The charges were consolidated for trial on a plea of not guilty to both counts.

The State presented evidence which tended to show the following. On the Friday before Easter in 1978, defendant came to the home of the prosecuting

witness and took her to his home. They were to go with defendant's wife to buy an Easter dress for the prosecuting witness. His wife was not yet home. Defendant called the prosecuting witness to the bedroom and had sexual intercourse with her. The prosecuting witness was eleven years old having been born on 18 November 1966, and testified she had never had sexual intercourse before this act. Defendant was twenty-nine years old. The prosecuting witness also testified that in the summer of 1978, defendant came to her home and picked her and her brother up and took them to his house trailer. When they got there, he gave her younger brother some cigarettes and told him to watch television while he packed in the bedroom. The brother was to call if anyone came to the door or the phone rang. Defendant then took the prosecuting witness to the bedroom and had intercourse

with her. The brother testified he came back to the bedroom when the phone rang and saw defendant pull up and buckle his trousers. The prosecuting witness testified about other occasions where defendant felt of her body. She further testified she was afraid to tell her mother of these events.

She finally told her mother some of these things in March, 1979 and later told police officers of all the actions of defendant. A medical examination in March, 1979 revealed the prosecuting witness was not a virgin.

Defendant's evidence tended to show the following. He denied ever having sex with his niece. On 28 July 1978, the date the State charged he raped his niece in the summer, he was in another city. Concerning the week before Easter, defendant offered evidence that he and his wife picked up the prosecuting witness at

her home and took her to buy an Easter dress and that she spent the weekend with them along with a female friend with whom the prosecuting witness slept. Defendant offered numerous witnesses on his good character and reputation.

The jury found defendant not guilty of the July charge but convicted him of the lesser included offense of second degree rape on the March charge. Defendant appeals.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matth and Assistant Attorney General Alan S. Hirsch, for the State.

Frank Patton Cooke and James R. Carpenter, for defendant appellant.

VAUGHN, Judge.

Defendant's motion for nonsuit was property denied. While there were some inconsistencies in the evidence for the State, the evidence and the inferences

therefrom were sufficient to take the case to the jury on the charged crimes. State v. Bell, 285 N.C. 746, 208 S.E.2d 506 (1974).

Defendant assigned error in the charge of the trial court on the lesser included offenses of second degree rape, assault with intent to commit rape and assault on a female. His argument on appeal is limited only to the charge on second degree rape. The rape statute then in effect provided:

Every person who ravishes and carnally knows any female of the age of 12 years or more by force and against her will, or who unlawfully and carnally abuses any female child under the age of 12 years, shall be guilty of rape, and upon conviction, shall be punished as follows:

(1) First-Degree Rape -

a. If the person guilty of rape is more than 16 years of age,

and the rape victim is a virtuous female child under the age of 12 years, the punishment shall be death; or

b. If the person guilty of rape is more than 16 years of age, and the rape victim had her resistance overcome or her submission procured by the use of a deadly weapon, or by the infliction of serious bodily injury to her, the punishment shall be death.

(2) Second-Degree Rape - Any other offense of rape defined in this section shall be a lesser-included offense of rape in the first degree and shall be punished by imprisonment in the State's prison for life, or for a term of years, in the discretion of the court.

G.S. 14-21 (repealed effective 1 January

1980). Prior to 1973 when the above quoted statute was adopted, there was no division of the crime of rape into first and second degrees. The legislative purpose of dividing the crime of rape into degrees was to reduce the mandatory sentence of death upon all convicted rapists. The 1973 revision did not reconstitute or redefine the crime of rape. State v. Davis, 291 N.C. 1, 229 S.E. 2d 285 (1976). Defendant contends the court should have charged only on G.S. 14-21(1)a and not G.S. 14-21 (2). The evidence did tend to show that defendant unlawfully and carnally abused a female child under the age of twelve and that defendant was more than sixteen years of age and that the victim was a virtuous child under the age of twelve. This would be a violation of G.S. 14-21 (1)a. The evidence on the age of defendant and the victim is not in conflict. However, there was some inference from

the evidence, though slight, that the victim was not a virtuous child under the age of twelve. If the child carnally and unlawfully known by a defendant is not virtuous, the crime would be second degree rape. G.S. 14-21(2). The General Assembly certainly did not want to make such an action against a child, even though unvirtuous, a noncriminal act. It was thus made second degree rape. Force and will of the victim when the victim is a child under the age of twelve have nothing to do with the crime. A child of such age is presumed incapable of consent. State v. Cox, 280 N.C. 689, 187 S.E.2d 1 (1972). To argue against the instruction on second degree rape, defendant must argue the victim was clearly and without conflict on the evidence within the age proscription and was virtuous. Then, the error in the instruction would be to the benefit and favor of defendant and not, therefore, a

ground for relief. See State v. Hall, 293 N.C. 559, 238 S.E.2d 473 (1977).

In this case defendant was charged with two rapes, one on or about 24 March 1978 and one on or about 28 July 1978. It was the former charge on which defendant was convicted of second degree rape. Of the latter, he was found not guilty. The prosecuting witness could not remember the exact dates of the rapes but instead related one to the purchase of an Easter dress and the other to the summer before school started. The dates in the warrants and indictments were created by the district attorney. Time for the charged offenses is not of the essence in this case as long as the time given for the offense is not at a time when the prosecuting victim is not under the age of twelve. Failure of the State to prove the crime was committed on the very date given in the indictment is not fatal to the case against the

defendant and does not entitle him to nonsuit. State v. King, 256 N.C. 236, 123 S.E.2d 486 (1962); State v. Gillyard, 246 N.C. 217, 97 S.E.2d 890 (1957). An exception to this rule results where the defense is one of alibi. In such a case, where alibi is used, the State cannot reopen the case and introduce evidence that the offense was committed on another date. State v. Whittemore, 255 N.C. 583, 122 S.E.2d 396 (1961). The trial judge recognized this rule of law and its exception. In his instruction, he recognized the defendant's evidence of alibi to the 28 July charge of rape and held the State to prove that offense occurred on 28 July or 29 July. This was proper. No alibi was offered for the 28 March defense. Rather, defendant's evidence tended to show that on or about that date, he was with the prosecuting witness but that someone else was also always with them.

The trial judge properly instructed on the facts and circumstances arising from this case.

After the defense rested, the State put on rebuttal evidence. Linda Harris was called as a witness and testified, in part, that in November or December, 1978, the prosecuting witness told her defendant had had sex with her. This corroborated the testimony of the prosecuting witness and a limiting instruction to that effect was given. Defendant now argues that this introduced evidence of another new accusation of rape that was without a time frame reference. The testimony did not rebut any alibi of defendant. There is no indication from the testimony that it was about anything other than the crimes of which defendant was then charged. The limiting instruction on corroboration properly placed the testimony in context for the jury.

No error.

Judges Hedrick and Clark concur.

APPENDIX C

Former North Carolina General Statutes §14-21 (repealed effective 1 January 1980) provided:

Every person who ravishes and carnally knows any female of the age of 12 years or more by force and against her will, or who unlawfully and carnally abuses any female child under the age of 12 years, shall be guilty of rape, and upon conviction, shall be punished as follows:

(1) First-Degree Rape -

a. If the person guilty of rape is more than 16 years of age, and the rape victim is a virtuous female child under the age of 12 years, the punishment shall be death; or

b. If the person guilty of rape is more than 16 years of age, and the rape victim had her resistance overcome or her

submission procured by the use of a deadly weapon, or by the infliction of serious bodily injury to her, the punishment shall be death.

(2) Second-Degree Rape - Any other offense of rape defined in this section shall be a lesser-included offense of rape in the first degree and shall be punished by imprisonment in the State's prison for life, or for a term of years, in the discretion of the court.

APPENDIX D

North Carolina General Statutes §7A-31 provides in relevant part:

§7A-31. Discretionary review by the Supreme Court.--(a) In any cause in which appeal has been taken to the Court of Appeals, except a cause appealed from the North Carolina Utilities Commission or the North Carolina Industrial Commission, the Supreme Court may in its discretion, on motion of any party to the cause or on its own motion, certify the cause for review by the Supreme Court, either before or after it has been determined by the Court of Appeals. A cause appealed to the Court of Appeals from the Utilities Commission or the Industrial Commission may be certified in similar fashion but only after determination of the cause in the Court of Appeals. The effect of such certification is to transfer the cause from the Court of Appeals to the

Supreme Court for review by the Supreme Court. If the cause is certified for transfer to the Supreme Court before its determination in the Court of Appeals, review is not had in the Court of Appeals but the cause is forthwith transferred for review in the first instance by the Supreme Court. If the cause is certified for transfer to the Supreme Court after its determination by the Court of Appeals, the Supreme Court reviews the decision of the Court of Appeals.

The State may move for the certification for review of any criminal cause, but only after determination of the cause by the Court of Appeals.

. . . .

(c) In causes subject to certification under subsection (a) of this section, certification may be made by the Supreme Court after determination of the cause by the Court of Appeals when in the opinion

of the Supreme Court

(1) The subject matter of the appeal has significant public interest, or

(2) The cause involves legal principles of major significance to the jurisprudence of the State, or

(3) The decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court.

. . . .

APPENDIX E

Judge Burroughs charge to the jury, in relevant part, was as follows:

Now, I charge that for you to find the defendant guilty of first-degree rape, the State must prove four things beyond a reasonable doubt: First, that the defendant had sexual intercourse with Sherry Lynn Knight, and by this, the slightest penetration is sufficient. Second, that Sherry Lynn Knight had not reached her twelfth birthday at the time of the sexual intercourse. Third, that at that time she was virtuous; that is, had never previously had sexual intercourse voluntarily. And fourth, that at that time, the defendant was more than sixteen years of age.

So, I charge that if you find from the evidence beyond a reasonable doubt that on or about March 24, 1978, Mark Summitt was more than sixteen years of age and

that he had sexual intercourse with Sherry Lynn Knight who at the time had not reached her twelfth birthday and was virtuous, it would be your duty to return a verdict of guilty of first-degree rape.

If you do not find the defendant guilty of first-degree rape, you must decide whether he is guilty of second-degree rape. Second-degree rape differs from first-degree rape in that it is not necessary for the State to prove that the defendant was more than sixteen years of age or that Sherry Lynn Knight was virtuous.

So, I charge that if you find from the evidence beyond a reasonable doubt that on or about March 24, 1978, Mark Summitt had sexual intercourse with Sherry Lynn Knight who at that time had not reached her twelfth birthday, it would be your duty to return a verdict of guilty of

second-degree rape. However, if you do not so find or have a reasonable doubt as to one or both of these things, you will not return a verdict of guilty of second-degree rape.

THE COURT'S CHARGE TO THE JURY ON THE OFFENSE OF SECOND-DEGREE RAPE, CONSTITUTES DEFENDANT'S EXCEPTION NO. 25.

If you do not find the defendant guilty of second-degree rape, you must decide whether he is guilty of assault with intent to commit rape.

The defendant -- assault with intent to commit rape is a lesser included offense of second-degree rape. You will recall my earlier summation of the evidence, and I will not repeat it for you, but you are to remember all of the evidence.

Now, I charge that for you to find the defendant guilty of assault with intent to commit rape, the State must prove three things beyond a reasonable doubt: First,

that the defendant assaulted Sherry Lynn Knight; that is, that he put his hands on her or put his body on top of hers. Second, that he intended to have sexual intercourse with her. And third, that at the time, she had not reached her twelfth birthday.

So, I charge that if you find from the evidence beyond a reasonable doubt that on or about March 28, 1978, Mark Summitt put his hands or put his body on top of Sherry Lynn Knight intending to have sexual intercourse with her and that she was under twelve years old at that time, it would be your duty to return a verdict of guilty of assault with intent to commit rape. However, if you do not so find or if you have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of assault with intent to commit rape.

THE COURT'S CHARGE TO THE JURY ON THE

OFFENSE OF ASSAULT WITH INTENT TO COMMIT RAPE CONSTITUTES THE DEFENDANT'S EXCEPTION NO. 26.

If you do not find the defendant guilty of assault with intent to commit rape, you must decide whether he is guilty of an assault on a female person by a male person.

The defendant, a male person, has been accused of assault on a female. An assault is an overt act or an attempt or an unequivocal appearance of an attempt with force and violence to do some immediate physical injury to the person of another, which show of force or menace or violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm.

You will recall my earlier summation of the evidence, and I will not summarize it for you again at this time, but you are to remember all of the evidence.

Now, I charge that for you to find the defendant guilty of assault on a female by a male person, that State must prove three things beyond a reasonable doubt: First, that the defendant intentionally assaulted Sherry Lynn Knight by placing his hands on her or putting his body on top of hers. Second, that Sherry Lynn Knight was a female person. And third, that Mark Summitt was a male person who had reached his eighteenth birthday.

So I charge that if you find from the evidence beyond a reasonable doubt that on or about March 24, 1978, Mark Summitt intentionally placed his hands on Sherry Lynn Knight or he put his body on top of Sherry Lynn Knight and that Sherry Lynn Knight was a female person and Mark Summitt was a male person who had reached his eighteenth birthday, it would be your duty to return a verdict of guilty of assault on a female person. However, if

you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

THE COURT'S CHARGE TO THE JURY ON THE OFFENSE OF ASSAULT ON A FEMALE PERSON CONSTITUTES DEFENDANT'S EXCEPTION NO. 27.

Now, Members of the Jury, I want to instruct you as to second-degree rape because in my earlier charge to you I left out a portion of it.

If you do not find the defendant guilty of first-degree rape, you must decide whether he is guilty of second-degree rape. Second-degree rape differs from first-degree rape in that it is not necessary for the State to prove the defendant was more than sixteen years of age or that Sherry Lynn Knight was virtuous.

So, I charge that if you find from the evidence beyond a reasonable doubt that

on or about March 24, 1978, Mark Summitt had sexual intercourse with Sherry Lynn Knight who at that time had not reached her twelfth birthday, it would be your duty to return a verdict of guilty of second-degree rape. However, if you do not so find or have a reasonable doubt as to one or both of these things, you will not return a verdict of guilty of second-degree rape, but you will consider whether or not the defendant is guilty of assault with intent to commit rape.

THE COURT'S CHARGE TO THE JURY ON THE OFFENSE OF SECOND DEGREE RAPE CONSTITUTES DEFENDANT'S EXCEPTION NO. 28.

Members of the Jury, the indictment alleges the offense to have occurred; that is, the second offense, to have occurred on or about July 28, 1978. The indictment is a document used to put the defendant on notice of the offense and the date the State alleges the offense to

have occurred. I have ruled that the State must be held to July 27th, July 28th, or July 29, 1978, as it pertains to the charges that I am about to give you at this time....

APPENDIX F

Counsel for Defendant, in his brief filed in the North Carolina Court of Appeals, argued, in part, as follows:

After the defendant had offered his alibi, the court below charged the jury in case of 79CRS-5133.

> "Members of the jury, the indictment alleges the offense to have occurred; that is, the second offense to have occurred on or about July 28, 1978. The indictment is a document used to put the defendant on notice of the offense and the date the State alleges the offense to have occurred. I have ruled that the State must be held to July 27th, July 28th or July 29th, as it pertains to the charges that I am about to give you at this time."

The court had already charged as to the offense on March 24, 1978, 79CRS5134.

This charge is misleading and obviously left the jury with the impression the date is not important and therefore destroyed the defense of alibi, by leaving the jury with the idea any date could be considered by them in reaching their decision, and resulted in an obvious compromise verdict of guilty of rape in the second degree.

Our courts have held that even though the date of the crime is not essential to the crime, it is a violation of the basic constitutional guarantee of a fair trial to place a date on the indictment then offer evidence of a specific time on the State's case in chief and after the defendant offers evidence of alibi, try to change the date on rebuttal.

> "True the time named in a bill of indictment is not usually an essential ingredient of the crime charged, and the State may prove

that it was in fact committed on some other date. G.S. Sec. 15-115; STATE v GENTRY ----, but this salutary rule, preventing a defendant who does not rely on time as a defense from using a discrepancy between the time named in the bill and the time shown by the evidence for the State, cannot be used to ensnare a defendant and thereby deprive him of an opportunity to adequately present his defense. The State did not contend that there was confusion as to the time named in the bill of indictment. It insisted the date named was in fact the true date; but when defendant's evidence, if believed, would establish their innocence, it then contended that jury could nevertheless, convict for the subsequent asserted wrongful acts. --- To permit a conviction on this evidence would

do violence to rights guaranteed by our Constitution, Art. I, Sec. 11. STATE v ROY, 92 N.C. 810, STATE v CORPENING, 191 N.C. 751, 133 S.E. 14, STATE v HARBERT, 185 N.C. 760, 118 S.E. 6, STATE v. WILKERSON, 164 N.C. 431, 79 S.E. 888. STATE v WHITTEMORE, 255 N.C. 583, 122 S.E. 2d 396 (1961).

In the case of STATE v WHITTEMORE, ibid., the trial court charged the jury:

> "...if you are satisfied from this evidence and beyond a reasonable doubt that the crimes were committed, even though it was on a date other than the particular date of March 19, 1961, the court instructs you, that you could return a verdict of guilty, even though the date may not

have been on that particular date."

"The time of the commission of a crime was therefore clearly material. There are many cases where no issue is based upon the time when the crime was committed. In such cases this instruction would be correct, but was misleading and erroneous in this case because the time was definitely fixed by the State, and the defense of an alibi was based upon that time. It is difficult to imagine a case where the time of the commission of a crime is not material to defense of alibi ...."

The wording of the charge in STATE v WHITTEMORE, ibid., different from the instant case, the imports is just as devastating to the defendant, by the trial court telling the jury, that the

date and time were unimportant as a matter of law and the jury being told it was unimportant in one case, they would naturally believe it was unimportant in the other. The defendant's evidence was strong enough to carry not guilty in case number 79CRS 5133, and strong enough to carry a verdict of not guilty of rape in the first degree in 79CRS5134.

Because of these errors committed in the trial, the unlawful conviction of rape in the second degree should be set aside.

APPENDIX G

The Defendant's Notice of Appeal filed in the Supreme Court of North Carolina stated, in relevant part, as follows:

(3) Appellant further asserts that his basic constitutional rights to a fair trial under Article I, Section 23 of the Constitution of North Carolina (formerly Article I, Section 11 of the Constitution of 1868, as amended) were violated by the trial court in allowing the State, over the defendant's objections and motions to strike, to place a date on their indictments, then offer evidence of a specific time on the State's case in chief, and after the defendant offered evidence of alibi, try to change the date on rebuttal. Subsequent thereto, the trial judge charged the jury that the date contained in the bill of indictment <u>for the second offense</u> alleged to have occurred on or about July 28, 1978, case #79CRS5133, was of import-

ance and could not be changed. The Court had already, however, at that time, charged as to the offense alleged to have occurred on or about March 24, 1978, case #79CRS5134. This charge as to the date on the bill of indictment relating to case #79CRS5133 was misleading and obviously left the jury with the impression that the date was not important as to the other charge. Therefore, this destroyed the defense of alibi, by leaving the jury with the idea that any date would be considered by them in reaching their decision, and resulted in an obvious compromise verdict of guilty of rape in the second degree as to case #79CRS5134.

Thus, the defendant was denied his constitutional right to receive a fair trial in violation of Article I, Section 23 of the Constitution of North Carolina.

This constitutional issue was timely raised by the appellant in the trial

tribunal and in the Court of Appeals and was determined erroneously by both Courts.

APPENDIX H

Counsel for Defendant, in his new brief filed in the Supreme Court of North Carolina, argued, in part, as follows:

This was also an obvious effort on the part of the State to provide some date. It attempted to change the date set by the District Attorney to some date to be fixed by the jury from spring through fall.

In his charge to the jury, Judge Burroughs instructed as follows regarding the alleged incident of July 28, 1978 (79CRS5133).

> "Members of the jury, the indictment alleges the offense to have occurred; that is, the second offense to have occurred on or about July 28, 1978. The indictment is a document used to put the defendant on notice of the offense and the date the State alleges the offense

to have occurred. I have ruled that the State must be held to July 27th, July 28th or July 29th, as it pertains to the charges that I am about to give you at this time."

The court had already charged as to the offense on March 24, 1978 (79CRS5134). This charge is misleading. No such limiting instruction was given to the jury regarding the March 24, 1978 incident. This obviously left the jury with the impression that the date was not important as to the earlier charge. Therefore, this destroyed the defense of alibi, by leaving the jury with the idea that any date could be considered by them in reaching their decision, and resulted in an obvious compromise verdict of guilty of rape in the second degree in the case of 79CRS5134, even though there was no evidence substantiating second degree rape, as hereinbefore discussed.

Our courts have held that even though the date of the crime is not essential to the crime, it is a violation of the basic constitutional guarantee of a fair trial under Article I, Section 23 of the Constitution of North Carolina (formerly Article I, Section 11 of the Constitution of 1868, as amended) for the State to place a date on the indictment, then offer evidence of a specific time on the State's case in chief, and after the defendant offers evidence of alibi, attempt on rebuttal to change or obscure the original date.

> "True the time named in a Bill of Indictment is not usually an essential ingredient of the crime charged, and the State may prove that it was in fact committed on some other date. GS Sec. 15-115. STATE v GENTRY...., but this salutary rule, preventing a defendant

who does not rely on time as a defense from using a discrepancy between the time seen in the bill and the time shown in the evidence for the State, cannot be used to ensnare a defendant and thereby deprive him of an opportunity to adequately present his defense.

"The State did not contend that there was confusion as to the time named in the Bill of Indictment. It insisted that the date named was in fact the true date; but when the defendant's evidence, if believed, would establish their innocence, it then contended that the jury could nevertheless, convict for the subsequent asserted wrongful acts.... To permit a conviction on this evidence would do violence to rights guaranteed by our Constitution.... STATE v ROY, 92 NC 810, STATE v

CORPENING, 191 NC 751, 133 SE 14, STATE v HARBERT, 185 NC 760, 118 SE 6, STATE v WILKERSON, 164 NC 431, 79 SE 888, STATE v WHITTEMORE, 255 NC 583, 122 SE 2d 396 (1961)."

Our Court of Appeals, in its consideration of this case, apparently recognized the problems and weaknesses of the State's case. It commented on the inconsistencies in the evidence for the State. Further, Judge Vaughn stated in his Opinion that "the prosecuting witness could not remember the exact date of the rape but instead, related one to the purchase of an Easter dress and the other to a summer before school started. The dates in the warrants and indictments were created by the District Attorney."

However, Judge Vaughn continued "time for the charged offense is not of the essence in this case, as long as the time given for the offense is not a time when

the prosecuting victim is not under the age of twelve." He then cited the case of STATEv KING, 256 NC 236, 123 SE 2d 486 (1962) and STATE v GILLYARD, 246 NC 217, 97 SE 2d 890 (1957) for the recognized rule of law that the "failure of the State to prove the crime was committed on the very date given in the indictment is not fatal to the case against the defendant, and does not entitle him to a non-suit." But, then he cites the STATE v WHITTEMORE case for the exception to the rule where the defense is one of alibi. "In such a case, where alibi is used, the State cannot reopen the case and introduce evidence that the offense was committed on another date."

Judge Vaughn stated that no alibi was offered for the March 24, 1978 offense. This is incorrect. The defendant, as previously discussed, offered evidence as to the fact that he was not even with the

prosecuting witness on March 24, 1978 but had been with her a week earlier in the presence of his wife and had purchased an Easter dress for the little girl on Tuesday, March 14, 1978. The prosecuting witness testified that the alleged rape occurred on Friday, March 24, 1978 and that this was the same date on which the defendant bought her her Easter dress.

It seems apparent that the defendant prepared for trial, relying on the times set forth in the bills of indictment. The defendant offered several witnesses to prove his claim of alibi. By allowing the State to offer rebuttal evidence in the form of Linda Harris and others to bolster the fact that the prosecuting witness had related that the defendant had sexually assaulted her at some time prior to November of 1978, had the effect of undermining the defendant's alibi and depriving him of the opportunity to offer

additional alibi evidence as to whatever other dates the alleged offense occurred on. In effect, the State offered rebuttal evidence tending to show that although the offenses charged may not have occurred on the dates specified in the bills of indictment, they occurred at some undetermined time during 1978, prior to November. This resulted in the denial of the defendant's right to be informed of the accusations against him and further deprived him of an opportunity to adequately prepare a defense to the charges made against him, resulting in the denial of a fair trial. This is in clear violation of Article I, Section 23 of the Constitution of North Carolina. This further falls withing the purview of the decision in the WHITTEMORE case.

In that case, the trial court charged the jury that the date and time when the offense charged occurred, were unimportant

as a matter of law. Judge Burroughs instruction in the case at bar, also had this effect. Judge Burroughs should have given a limiting instruction to the jury as to the March 24, 1978 incident charging them that the State was held to prove that the offense occurred on that date. The net result in this case was that the State was not required to prove any specific date upon which the first alleged incident occurred. Thus, the defendant was denied his right of a fair trial under Article I, Section 23 of the Constitution of North Carolina. The date charged was certainly material in this case. Yet, Judge Burroughs did not hold the State to prove any specific date upon which the alleged March 24, 1978 charge occurred, and then, in effect, conveyed to the jury that they could convict if the offenses charged, occurred at any time other than March 24, 1978. See

STATE v VINCENT, 35 NC App 369, 241 SE 2d 390, 392 (1978).

IV. THE DEFENDANT"S BASIC CONSTITUTIONAL RIGHT TO A FAIR TRIAL UNDER ARTICLE I, SECTION 23 OF THE CONSTITUTION OF NORTH CAROLINA WAS VIOLATED BY THE TRIAL COURT IN ALLOWING THE STATE, OVER THE DEFENDANT'S OBJECTIONS AND MOTIONS TO STRIKE, TO PLACE A DATE ON THEIR INDICTMENTS, THEN OFFER EVIDENCE OF A SPECIFIC TIME ON THE STATE'S CASE IN CHIEF, AND AFTER THE DEFENDANT OFFERED EVIDENCE OF ALIBI, ATTEMPT TO CHANGE THE ORIGINAL DATE, AND BY THE TRIAL COURT'S THEN CHARGING THE JURY THAT THE DATE WAS UNIMPORTANT.

The defendant hereby incorporates by reference and reargues the argument contained under Issue III in this brief.

CONCLUSION

It is respectfully submitted that for the reasons and arguments set forth above, the trial court committed reversible error.

Wherefore, the defendant appellant respectfully requests that the cause should be reversed and that the defendant appellant should be granted a new trial.

APPENDIX J

State of North Carolina v. Whittemore, 255 N.C. 583, 122 S.E. 2d 396 (1961).

Appeals by defendants from Campbell, J., April 1961 Criminal Term of Buncombe.

Ray Whittemore was charged in separate bills with commission of two crimes on 19 March 1961: (1) "the abominable and detestable crime against nature with one Barbara _____, age 13," conduct declared criminal by G.S. 14-177; and (2) "did abuse and carnally know Barbara _____ a female child over twelve and under sixteen years of age, who at said time had never before had sexual intercourse with any person, he the said Ray Whittemore, a male, being at the time over eighteen years of age," conduct declared criminal by G.S. 14-26.

Elmer Whittemore was charged in separate bills with identical crimes on the same date and place with Patricia

_____, twelve years of age.

The names of the females are shown in the bills of indictment but are here purposely omittted. They are half sisters. Elmer is the father of Ray.

By consent the cases wer consolidated for trial. Verdicts of guilty as to each defendant on each charge were returned. Each defendant was sentenced to prison on each count, the sentences to run concurrently.

Attorney General Bruton and Assistant General McGalliard for the State.

Don C. Young and Lamar Gudger for defendant appellants.

Rodman, J. Each defendant's motion for nonsuit was overruled. Hence the first question for determination is: Was there any evidence to establish each essential ingredient of each crime?

Ervin, J., in his usual clear-cut and concise manner, stated what it was neces-

sary to prove in order to convict a defendant for violating G.S. 14-26. He said: "Three essential ingredients must coexist to render a male person guilty of the statutory felony of obtaining carnal knowledge of a virtuous girl between the specified ages. They are: (1) The male persons must have carnal knowledge of the girl; (2) the girl must be over twelve and under sixteen years of age; and (3) the girl must never before have had sexual intercourse with any person. S. v. Swindell, 189 N.C. 151, 126 S.E. 417. The terms 'carnal knowledge' and 'sexual intercourse' are synonymous. There is 'carnal knowledge' or 'sexual intercourse' in a legal sense if there is the slightest penetration of the sexual organ of the female by the sexual organ of the male. It is not necessary that the vagina be entered or that the hymen be ruptured; the entering of the vulva or labia is

sufficient. (Citing authorities.)" S. v. Bowman, 232 N.C. 374, 61 S.E. 2d 107.

Conduct declared criminal by G.S. 14-177 is sexual intercourse contrary to the order of nature. Proof of penetration of or by the sexual organ is essential to conviction. This interpretation was put on the statute in State v. Fenner, 166 N.C. 247, 80 S.E. 970, decided in 1914. The Legislature has not disapproved of the interpretation then given by amending the statute. That interpretation accords with the interpretation generally given to similar statutes. The Supreme Court of Maine said: "(I)t does not follow that every act of sexual perversion is encompassed within the definition of 'the crime against nature'...The crime against nature involving mankind is not complete without some penetration, however slight, of a natural orifice of the body. The penetration need not be to any particular

distance." S. v. Pratt, 116 A. 2d 924; S. v. Hill, 176 So. 719 (Miss.); People v. Angier, 112 P. 2d 659 (cal.); Hopper v. S., 302 P. 2d 162 (Okla.); S. v. Withrow, 96 S.E. 2d 913 (W. Va.); Wharton v. S., 198 S.E. 823 (Ga.); 81 C.J.S. 371; 48 Am. Jur. 550.

An article entitled "The Law of Crime against Nature" was published in 32 N.C. Law Rev. 312 in 1954. The author traces the history of the statute, takes note of the few times this Court had been called upon to interpret the statute and the need of additional legislation to specifically define criminal sexual conduct. The Legislature, at the session following the publication of this article, enacted c. 764 S.L. 1955, now G.S. 14-202.1. That Act supplements G.S. 14-177. S. v. Lance, 244 N.C. 455, 94 S.E. 2d 335. The law as declared in S. v. Fenner supra, remains in force.

To support the conviction of defendant Elmer Whittemore the State relies on testimony of Patricia. She testified that he invited her into an uninhabited house. "He then told me to pull off my pants...I pulled my pants below my knees. After I pulled my panties down below my knees, he put his privates against mine. He was laying on his back and made me lay down on him. I stayed inside the house about two or three minutes before he told me to pull my panties down. After he went in the house, he pulled his trousers off of one leg and laid down flat on his back on the floor. He made me put my hands on his privates and he put his hands on my privates. He kept it there about two or three minutes; he just left it there. After he had done that for two or three minutes, he put his mouth on my breast and after that he put it on my privates and kept his mouth there about

one or two minutes. He just left it there ... He had his privates at my privates rubbing it up and down. I said at. He did that about one or two minutes ..."

No matter how disgusting and degrading defendant's conduct as depicted by the witness may have been, his conviction should not be sustained unless the evidence suffices to prove the existence of each essential ingredient of the crimes for which he was being tried. The evidence is insufficient to establish the "penetration" necessary for a conviction under each of the statutes. We conclude the motion of defendant Elmer Whittemore for judgment of nonsuit as to each of the charges for which he was on trial should have been allowed.

Ray Whittemore has suffered from cerebral palsy since birth. He finds it difficult, if not impossible, to get

around without assistance. Such relations as he had with Barbara took place in the truck in which he, his father, and the two girls had been riding. Without setting out her testimony in detail with respect to what she did and what defendant Ray Whittemore did, suffice it to say that her testimony substantially duplicates the testimony of Patricia with respect to her relations with the defendant Elmer. Barbara'a testimony standing along, therefore would not suffice to convict the defendant Ray Whittemore of either of the crimes because of the failure to establish penetration.

But the State was not content to rely solely on the testimony of the girls to convict Ray Whittemore. As to him it sought to fortify their testimony by a purported confession.

When the confession was offered, defendant objected and asked to be heard

on the question of admissibility in the absence of the jury. The jury was excused. The record discloses this colloquy between counsel and the court:

"MR. YOUNG: Well, sir, if your Honor please, I want to put on some evidence as to the admissibility of anything that he said to him about it.

"COURT: Go ahead and ask him.

"MR. YOUNG: I want to put on some other witnesses.

"COURT: As to whether or not it was a voluntary statement?

"MR. YOUNG: As to whether or not he is capable of making it, knowing what he was doing.

"COURT: He operates a grocery store.

"COURT: What you have brought out so far, the boy is incapable of walking, you haven't brought out anything that he is incapable of talking.

"MR. YOUNG: Yes, sir but this witness

doesn't know about that. I think I can show by the doctor, Dr. Waller, here, as to his condition.

"COURT: You mean that he in mentally incompetent?

"MR. YOUNG: Yes, sir.

"COURT: Has he ever been committed?

"MR. YOUNG: No, sir, not that I know of.

"COURT: Ever been adjudicated incompetent?

"MR. YOUNG: Not that I know of.

"COURT: Well, I am going to let it in. This is the first time I have heard the plea of insanity in the case.

"MR. YOUNG: No, sir, I am not pleading insanity. I am pleading inadmissibility of the statement, anything about it.

"COURT: I will overrule the objection. Bring the jury back in."

Thereupon, over defendant's objection, the witness was permitted to testify that

on Saturday morning, 8 April, while in jail, Ray Whittemore told him that on Sunday, 19 March, he went to the Moss home where Patricia and Barbara lived; he asked the girls if they wished to ride up the mountain and turn around. Ray then told the witness: "We drove up the mountain and came to an old house. I asked Patsy and Barbara if me and my dad could do it to them, and they said yes ... After Daddy left with Patsy, Barbara pulled her pants off and I started to play with her privates...After we played with each other for a while, I was lying on my back and told her to get up on top, and she did. I took my privates and rubbed it through the lips of her privates."

An extrajudicial confession is competent only when made understandingly and voluntarily. S. v. Davis, 253 N.C. 86, 116 S.E. 2d 365; S. v. Rogers, 233 N.C. 390, 64 S.E. 2d 572. A subnormal mental con-

dition, standing alone, does not render incompetent a confession that is voluntary and understandingly made. If accused has sufficient mental capacity to testify, he has sufficient mental capacity to confess. Artesani v. Gritton, 252 N.C. 463, 113 S.E. 2d 895; S. v. Isom, 243 N.C. 164, 90 S.E. 2d 237, 69 A.L.R. 2d 358; 23 C.J.S. 226-227; 20 Am. Jur. 449. But mental capacity, or rather the lack of such capacity, is an important factor to be considered with other factors in determining whether in fact the purported confession was voluntary. Blackburn v. Alabama, 361 U.S. 199, 80 S. Ct. 274, 4 L. ed. 2d 242; Fikes v. Alabama, 352 U.S. 191, 77 S. Ct. 281, 1 L. ed. 2d 246. What confessions are admissible is the subject of an extensive annotation following the Fikes case, 1 L. ed. 2d 1735.

Defendant in his brief filed here contends the evidence subsequently offered

in his defense clearly establishes the confession was not in fact voluntary and should have been excluded.

The officer to whom the statement was given testified after the confession was admitted: "I do not know whether Ray Whittemore went to school or not. I do know that Ray Whittemore is severely handicapped. I remember that Ray Whittemore asked for aspirin while I was talking with him and I sent and had two aspirins brought to him. Ray Whittemore told me that he was nervous and that he did not sleep well. That was the morning after he spent the night in jail. I do know that he can't get around by himself at all, and when he was put in jail, his crutches were taken away from him. I did not bring Ray Whittemore out of the jail to talk to him, and I wrote up his statement up there in the jail at that time."

Doctors Waller and Atkins, both of

whom had attended the defendant Ray testified to his physical and mental condition. Dr. Waller said he did not believe that defendant was normal mentally. He further testified: "There is a difference between insanity and full menticulture. Ray Whittemore is very slow and labored in his speech. He has a very limited vocabulary and is mentally dull. I would say that his IQ is about 80." Dr. Atkins likewise testified that Ray Whittemore did not have normal intelligence but in his opinion is able, within "certain limits" to understand what he is saying and to relate to a limited degree incidents that have occurred. Mrs. Goldie Woody, with five years of experience in teaching handicapped children in a Buncombe County school system, taught defendant Ray for five years. In that period he learned to write his name and learned to read through a Second Grade

reader. "He had a great imagination and could be persuaded any way. If you told him anything, he would really believe it."

It is, we think manifest that counsel and the court misunderstood each other as to the basis of defendant's objection. If the court had heard, before admitting the confession, the testimony subsequently given, it would have been his duty to weigh the evidence and determine whether the confession was in fact understandingly and voluntarily made.

Defendant argues that his guilt has not been established even if the purported confession was in fact free and voluntary. His position is that the corpus delicti has not been established except by the confession, and a confession cannot be used to prove any essential element of the alleged crime, contending it can only be used to corroborate other evidence sufficient of itself to establish each

essential ingredient of the crime. To support his contention he cites and relies upon S. v. Cope, 240 N.C. 244, 81 S.E. 2d 773.

Defendant would stretch the Cope case far beyond the question then propounded and answered. The question then for decision was: "Is a naked extrajudicial confession, uncorroborated by any other evidence, sufficient to sustain a conviction of a felony?" The answer given is in this language: "In view of the fact that the overwhelming authority in this country is to the effect that a naked extrajudicial confession of guilt by one accused of crime, unaccompanied by any other evidence, is not sufficient to warrant or sustain a conviction, the answer to the first question under consideration should be in the negative."

Evidence to corroborate the confession need not be direct. It may be circumstan-

tial. S. v. Thomas, 241 N.C. 337, 85 S.E. 2d 300. While there is difference of opinion in the appellate courts of the country with respect to the necessity for evidence aliunde the confession to clearly establish each element of the crime, the weight is, we think, with the rule as stated in Masse v. U. S., 210 F. 2d 418. It is there said: "A conviction cannot be had on the extrajudicial confession of the defendant, unless corroborated by proof aliunde of the corpus delicti. Full, direct, and positive evidence, however, of the corpus delicti is not indispensable. A confession will be sufficient if there be such extrinsic corroborative circumstances, as will, when taken in connection with the confession, establish the prisoner's guilt in the minds of the jury beyond a reasonable doubt." S. v. Morro, 281 S.W. 720; S. v. Knowles, 83 S.W. 1083; Brower v. S., 64 So. 2d 576; Vanderheiden

v. S., 57 N.W. 2d 761; S. v. La Louche, 166 A. 252; Daeche v. U. S., 250 F. 566; Mills v. S., 59 S.W. 2d 147; Campbell v. Commonwealth, 75 S.E. 2d 468; Pearlman v. U. S., 10 F. 2d 460; Opper v. U. S., 348 U.S. 84, 99 L. ed. 101, 75 S. Ct. 158, 45 A.L.R. 2d 1308.

We do not think it now necessary to determine the extent to which the corroborating circumstances must go. Suffice it to say that the evidence offered by the State was subject to an explanation and interpretation by defendant himself. As said in Vanderheiden v. S., supra: "Circumstances capable of an innocent construction may be interpreted in the light of defendant's admissions, and the fact under investigation be thus given a criminal aspect." We have said that Barbara's use of the word "at" was not, standing alone, sufficient to establish penetration. It left the question too

conjectural. But defendant's explanation of what occurred is, we think, sufficient to remove the doubt as to the meaning of the word "at."

If the confession was in fact voluntary, the evidence offered by the State was sufficient to support a conviction.

As noted above, the confession dealt with matters alleged to have occurred on Sunday, 19 March, the date charged in the bill of indictment, but the confession was not limited to matters occurring on that date. It purported to describe similar sexual conduct by both defendants with both girls "on or about April the first." It quotes Ray as saying he discontinued his relations with Barbara on that occasion because he was seen by some boys and knew he was caught. This portion of the confession was admitted over defendant's objection.

The State's evidence prior to the time

it offered the confession was limited to 19 March 1961, as charged in the bill of indictment. Both girls definitely fixed that day as the time. Patricia not only fixed the day of the month but the day of the week, Sunday. Barbara specifically testified this was the only time she went with defendants to the Cole place.

To support their pleas of not guilty, each defendant contended he was a man of good character and was not in the vicinity of the place named by the State's witnesses on the day the crimes were alleged to have been committed. Several witnesses testified in support of defendants' contentions. Defendant Elmer was a witness. He denied his or his son's guilt, stating in detail where they were on the day of the crime as stated in the bill of indictment. Defendant Ray did not testify.

After defendants rested, the State offered in rebuttal the testimony of two

boys, Kermit Cole and Dan Garrison. The Cole boy testified: "I saw Ray Whittemore and Barbara _____ in the truck about 6:30 in the evening. Barbara was sitting on top of Ray. As we came by the truck, Barbara _____ jumped up." He fixed the time as "about the middle or at the last of March when this happened...I do not know what day it was nor what day of the week. We were going to the mountain to get some fence wire. Dan and I had been to school that day and it was not on a Sunday."

Dan Garrison testified: "I went with Kermit to the upper Cole place and we saw the truck. We walked on the right side of the truck and the door was open. We say Ray and Barbara _____ and Barbara was on top of Ray. Barbara's clothes was off and she jumped up when she saw us."

The court in its charge reviewed the

evidence of the defendants to establish an alibi. It charged: "(I)t is incumbent upon the State of North Carolina to satisfy you from the evidence and beyond a reasonable doubt that the defendant Ray Whittemore, on the 19th day of March, 1961 carnally knew or abused Barbara _____, she being over twelve and under sixteen years of age, and she never before having had sexual intercourse with any person, so that before you would be justified or entitled to find the defendant guilty of that offense, it would be incumbent upon the State to satisfy you from the evidence and beyond a reasonable doubt, first, that Barbara _____ was virtuous girl, that is, she had never before had sexual intercourse with any person."

When the court finished its charge, it inquired:

"COURT: Any further requests from either counsel?

"MR. YOUNG: No, Sir.

"SOLICITOR: Your Honor, I looked for this yesterday and didn't find it until this morning. If it is not too late, in accordance with the decision in STATE v. GILLYARD, 246 N.C. 217, and STATE v. TRIPPE, in 222 N.C. at 600, the State would ask that an instruction to the effect that time is not of the essence, that if the jury should find that the acts complained of occurred on some other day than that charged in the indictment, it would not relieve the defendant of criminal responsibility. I have those decisions here if your Honor would indulge me a moment.

"COURT: I am going to let the charge stand as I have given."

The jury retired at 10:21. At 12:08 the jury returned, requesting further instructions.

"COURT: Members of the jury, I under-

stand there is a question which you desire to ask?

"JUROR: As to the date of the crime committed do we have to confine our decision to the date of March 19, or can we form a decision that the crime was committed?

"COURT: Members of the jury, with regard to the date, the Court will instruct you that if you are satisfied from this evidence and beyond a reasonable doubt that the crime was committed bearing in mind that with regard to the crime of carnal knowledge it is necessary for the State to satisfy you as to the element that is that the girl in each case that is Barbara _____ in the one case and Patricia _____ in the other case that at the time they had neither of them or the respective one as to the respective defendant had never had sexual intercourse with any other person prior to that time

bearing in mind that that is one of the necessary elements of that particular crime; then as far as the date is concerned if your are satisfied from this evidence and beyond a reasonable doubt that the crime or crimes were committed even though it was on a date other than the particular date of March 19, 1961 the Court instructs you that you could return a verdict of guilty even though the date may not have been that particular day. Does that answer the question?

"JUROR: Yes."

The jury thereupon retired and returned a verdict of guilty at 12:13.

Manifestly the jury was in doubt as to the guilt of defendants of the crime charged in the bill of indictment--that is sexual misconduct as described on 19 March 1961. It had heard the solicitor request and the court refuse to give an instruction that the time of commission

was not a material factor. The State's evidence in chief other than the purported confession of defendant Ray, related to one and only one date on which the prohibited sexual conduct occurred. The confession fixed two dates on which prohibited conduct occurred. This confession was in the possession of the State when the bills were drawn and returned by the grand jury. Notwithstanding the State's knowledge of what Ray had confessed, the bill of indictment did not charge criminal acts committed the last of March or early April.

Defendants prepared for trial relying on the time fixed in the bills. They offered numerous witnesses to prove their claimed alibi. Manifestly the jury was impressed with the evidence offered. They remained out for 1-3/4 hours without agreement; but when the court in effect told them that the date

charged was immaterial, they reached a verdict in less than five minutes. The charge in effect told the jury the evidence offered by the defendants was not material on the question of defendant's guilt and in effect told the jury they could convict if the offenses charged occurred the last of March or the first of April.

True the time named in a bill of indictment is not usually an essential ingredient of the crime charged, and the State may prove that it was in fact committed on some other date. G.S. 15-155; S. v. Bryant, 228 N.C. 641, 46 S.E. 2d 847; S. v. Baxley, 223 N.C. 210, 25 S.E. 2d 621; S. v. Trippe, 222 N.C. 600, 24 S.E. 2d 340. But this salutary rule, preventing a defendant who does not rely on time as a defense from using a discrepancy between the time named in the bill and the time shown by the evidence

for the State, cannot be used to ensnare a defendant and thereby deprive him of an opportunity to adequately present his defense. The State did not contend that there was confusion as to the time named in the bill of indictment. It insisted the date named was in fact the true date; but when defendants' evidence, if believed, would establish their innocence, it then contended the jury could, nevertheless, convict for the subsequent asserted wrongful acts. The testimony of young Cole and Garrison, offered only after defendants had rested, relates to conduct subsequent to that charged in the bill and tends to corroborate the confession. Defendants were without any opportunity at that time to refute the State's evidence in rebuttal. To permit a conviction on this evidence would do violence to rights guaranteed by our Constitution, Art. I, sec. 11. S. v.

Ray, 92 N.C. 810; S. v. Corpening, 191 N. C. 751, 133 S.E. 14; S. v. Harbert, 185 N.C. 760, 118 S.E. 6; S. v. Wilkerson, 164 N.C. 431, 79 S.E. 888. In S. v. King, 50 Wash, 312, 16 Ann. Cas. 322, defendant was charged with obtaining money by false and fraudulent pretenses. His defense was alibi. The trial Court, charging the jury with respect to the time fixed in the bill of indictment, said: "I will say in that connection that the exact date is immaterial. It does not make any difference, so far as the crime is concerned, if the defendant committed the crime as charged at any time within the period of three years prior to the time the information was filed." In answering this statement of the trial court, the appellate court said: "The witnesses for the state had fixed the date when the crime was committed as being between the 12th and 15th day of

February, 1907. The defense was that the defendant was not the person who obtained the money, and that he was sick at home, unable to leave his room between those dates. The time of the commission of the crime was therefore clearly material. There are many cases where no issue is based upon the time when the crime was committed. In such cases this instruction would be correct, but was misleading and erroneous in this case because the time was definitely fixed by the state, and the defense of an alibi was based upon that time. It is difficult to imagine a case where the time of the commission of a crime is not material to the defense of alibi." People v. McCullough, 101 P. 2d 531; S. v. Severns, 125 P. 2d 659; S. v. Clark, 146 P. 1107; 53 Am. Jur. 498.

The time elapsed between the alleged offense and the trial was relatively short. The record does not disclose the

date of trial, but it was during a two weeks' terms which began on 17 April. Under the factual situation depicted by this record we are of the opinion that the time charged in the bill was material and vital to defendants' defense. We hold the court erred in charging otherwise.

As to defendant Elmer

Reversed.

As to defendant Ray

New trial.

CERTIFICATE OF SERVICE

The undersigned counsel for the Defendant-Petitioner hereby certifies that on this date he has served the foregoing Petition for Writ of Certiorari upon the State of North Carolina, which is the only party required to be served, by depositing three (3) copies of same in the United States Mails, with first-class postage prepaid, addressed to each of the counsel of record for the said Respondent, as follows:

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This the 3rd day of March, 1981.

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